In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 143

MORTIMER NORMAN KORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

QUESTIONS PRESENTED

Whether the court erred in admitting into evidence (1) testimony concerning a conversation between petitioner and an informant which Secret Service agents overheard by means of an electronic device carried by the informant, (2) testimony of a Secret Service agent concerning conversations between petitioner and the agent and the tape recordings of those conversations, and (3) recordings of telephone conversations made with the consent of one of the parties to the conversation.

356-642—69

STATEMENT

An indictment returned in the United States District Court for the Southern District of Florida charged petitioner with several counterfeiting offenses in violation of 18 U.S.C. 474. Counts 1 and 2 charged that on or about June 27, 1966, petitioner, with intent to defraud, made a print of a $5.00 and $1.00 Federal Reserve Note; count 4 charged that on June 27, 1966, petitioner had possession of such notes. Count 3 charged that on June 28, 1966, petitioner, with intent to defraud, made a print of a $1.00 Silver Certificate, and count 5 charged that petitioner had possession of that note.[1] After a jury trial, petitioner was convicted on counts 3 and 5 and was acquitted on the other three counts. He was sentenced to five years imprisonment on each of the two counts, the sentences to run concurrently.

1. On June 27, 1966, after receiving information from Richard Schatzabel that petitioner was involved in printing counterfeit currency and drivers' licenses, Secret Service agents Arthur Rivers and Kenneth Hansen met Schatzabel at a gasoline station. The agents searched Schatzabel for contraband, outfitted him with a transmitting device, and instructed him to meet petitioner to continue discussions with him about a proposed counterfeiting transaction (Tr. 9–11, 47–49, 154–156).[2] Schatzabel went to petitioner's printing shop, while Rivers and Hansen waited

[1] Count 6 was dismissed prior to trial.

[2] We are lodging a copy of the trial transcript with the Clerk of this Court.

nearby with a radio receiver, over which they heard Schatzabel ask the person in the shop, whom he addressed as "Mort," for the "samples." They heard "Mort" explain to Schatzabel that the "samples" were bad because they had been made in a hurry, and tell him that he was willing to "go ahead" if he was paid $150,000. Schatzabel replied that he would have to discuss payment with "Spiegel and his people in New York" (Tr. 52–53, 158–160). When Schatzabel emerged from the printing shop, he gave Rivers the "samples"—a counterfeit one dollar and a counterfeit five dollar Federal Reserve Note (Tr. 54, 160–161). These two notes were the subject matter of counts one, two and four, the counts on which the jury acquitted petitioner.

On June 28, 1966, Schatzabel telephoned petitioner from the Secret Service office and told him that "Spiegel" and his people wanted to meet petitioner and see some samples, and he arranged to take petitioner to the meeting (Tr. 17–18, 56–57, 161–162, 170–174). With Schatzabel's consent, this conversation was overheard by Rivers and was recorded (Tr. 57, 162). At the meeting that afternoon, Schatzabel introduced agent Rivers to petitioner as "Max Spiegel". When Rivers complained about the poor quality of the notes that petitioner gave to Schatzabel on the previous day, petitioner assured him that the notes did not reflect his true printing ability. They talked about counterfeit money and about printing counterfeit drivers' licenses. After Rivers asked for some indication that petitioner was a competent printer,

petitioner left to get some further samples of his work. An hour later, petitioner returned and gave Rivers an oversized $1.00 Silver Certificate, the subject matter of counts 3 and 5, on which petitioner was convicted (Tr. 58–64, 66–73). During these two meetings, which occurred beneath a bridge, Rivers was equipped with a transmitter, and the conversations were received and recorded by agent Hansen, who was stationed nearby (Tr. 175–198, 198–224).

Subsequently, on June 29 and June 30, in telephone calls to petitioner, which were recorded by agent Hansen, Rivers, posing as "Spiegel," told petitioner that he wanted to proceed with counterfeit drivers' licenses rather than with counterfeit money. On July 1, Rivers, again in a recorded conversation, telephoned petitioner to arrange for a meeting under the bridge (Tr. 76–80, 89–90, 224–232). At this meeting, petitioner delivered 100 Florida drivers' licenses to Rivers, and was arrested (Tr. 91–92, 233–234).

2. Petitioner's trial was held in September 1967. At the outset of the trial, petitioner's counsel stated that he did not expect that Schatzabel would be present to testify (Tr. 34). Counsel made no request for a continuance, and he told the jury in his opening statement to ask themselves "the question as to whether or not the government is going to produce for your consideration the motivator and the leading actor behind this entire plan, one Richard Schatzabel." He concluded with the statement that Schatzabel would not testify and that the government would fail to sustain the allegations of the indictment (Tr. 44–45). Thereafter, as part of the government's case,

Rivers stated that the last time he saw Schatzabel was in August 1966 and that subsequently he had sought unsuccessfully to locate him (Tr. 93–94). Rivers testified as to his conversations with petitioner, and both Rivers and Hansen testified as to the conversation between petitioner and Schatzabel which they overheard by means of the radio receiver. The tape recordings of the conversations among Rivers, petitioner, and Schatzabel beneath the bridge and the tapes of the various telephone conversations were also introduced into evidence.[3]

DISCUSSION

This case involves the admissibility of evidence obtained through the government's use of electronic equipment to overhear and record conversations with the consent of one of the parties thereto—issues similar to those presented in *United States* v. *White,* No. 46, this Term, certiorari granted, 394 U.S. 957. The present case is different from *White,* inasmuch as the consenting party, agent Rivers, testified at trial,[4] and is thus even more clearly controlled by *Lopez* v. *United States,* 373 U.S. 427, and *Kaufer* v. *United States,* 394 U.S. 458. In our brief in opposition in an essentially similar case, *Franke, et al.* v. *United States,* No. 161, this Term, we relied on that difference in suggesting that the petition could be

[3] Petitioner did not testify. In his closing argument to the jury, defense counsel contended that the government should have produced Schatzabel as a witness.

[4] Although the government also introduced evidence relating to the overhearing of the conversation between the petitioner and Schatzabel on June 27, 1966, in the printing shop, petitioner was acquitted on the counts based on this conversation.

acted on without awaiting the decision in *White*. While we continue to think that course is appropriate, we would have no objection, if the Court views this case and *White* as interrelated, to the deferment of disposition of the instant petition, with respect to Koran's Fourth Amendment contention,[5] until after the decision in *White*. Petitioner's alternate argument—prompted by the adverse effect of *Desist* v. *United States*, 394 U.S. 244, and *Kaufer, supra*, on the applicability of *Katz* v. *United States*, 389 U.S. 347—that the admission of the agents' testimony violated his privilege against self-incrimination is without merit, since petitioner's conversations were entirely voluntary. See *Hoffa* v. *United States*, 385 U.S. 293, 303–304.[6]

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[5] The Seventh Circuit in *White* distinguished *Lopez* on the ground that the government agent in that case testified at trial while the undercover agent in *White* was unavailable at trial. See 405 F. 2d 838, 847. As we argue in our brief on the merits in *White* (pp. 24–26), however, the legality under the Fourth Amendment of consensual eavesdropping should be determined as of the time of the overhearing, and should not be affected by the availability of witnesses at trial.

[6] As for the recorded telephone conversations, the fact that petitioner did not initiate the calls is immaterial so long as one of the parties, as here, consented to the recordation. See *Rathbun* v. *United States*, 355 U.S. 107.

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